

**Philadelphia Lotus 02A LLC v Wilmington Trust,
N.A.**

2025 NY Slip Op 33643(U)

September 26, 2025

Supreme Court, New York County

Docket Number: Index No. 652951/2025

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

PHILADELPHIA LOTUS 02A LLC,

Plaintiff,

INDEX NO. 652951/2025

MOTION DATE 06/30/2025

MOTION SEQ. NO. 001

- v -

WILMINGTON TRUST, NATIONAL ASSOCIATION,
MIDLAND LOAN SERVICES, PNC BANK, NATIONAL
ASSOCIATION

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion to dismiss is granted in part.

Background

In 2018, Philadelphia Lotus (“Plaintiff”) entered into a loan agreement for \$6,011,850.00 with CoreVest American Finance Lender LLC. Defendant Wilmington Trust (“Lender”) is the successor in interest to CoreVest. The Loan in question was serviced by defendant Midland Loan Services, who is a subsidiary of defendant PNC Bank, National Association (collectively with Midland, the “Servicer Defendants”). Plaintiff made timely interim payments, but as the Loan approached maturity (originally set for December 09, 2023), Plaintiff inquired about the cost of extending the closing due to a refinancing delay. In an email dated November 30, 2023, a principal for Midland informed Plaintiff that in order to go past the maturity date Plaintiff would need to pay “a \$7,500.00 Fee retainer (\$5,000 Asset Management Review Fee + \$2,500.00 Legal Fee Retainer)” and that there would be default interest applied (the “Extension Email”).

Then in a loan payoff letter sent to Plaintiff from Midland, a late charge of \$280,518.56 (the “Late Charge”) was included in the amount due. Plaintiff protested the Late Charge and demanded that it be removed. In response, Midland pointed to the terms of the Loan Agreement, specifically Section 2.2(h). There was back and forth between the parties over the Late Charge, but when the parties closed on December 28, 2023, Plaintiff paid the Late Charge in order to close on the loan. The following day, Plaintiff sent a demand notice to Midland regarding the Late Charge. When that and subsequent demand notices did not result in the Late Charge being refunded, Plaintiff filed the present proceeding with claims of breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and promissory estoppel. Defendants bring the present pre-answer motion to dismiss.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, “the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference.” *Avgush v. Town of Yorktown*, 303 A.D.2d 340, 341 [2d Dept. 2003]. Dismissal of the complaint is warranted “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.”

Connaughton v. Chipotle Mexican Grill, Inc, 29 N.Y.3d 137, 142 [2017].

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a “defense founded upon documentary evidence.” Dismissal is only warranted under this provision if “the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]. A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the

pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, “[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 [1977].

Discussion

Defendants move to dismiss the complaint in its entirety on the grounds that 1) they were entitled to assess the Late Charge by the terms of the Loan Agreement; 2) Plaintiff is barred from challenging the Late Charge under the voluntary payment doctrine; 3) the quasi-contract claims are duplicative of the breach of contract claims; and 4) the Servicer Defendants are not parties to the contract. Plaintiff opposes the motion. For the reasons that follow, the motion to dismiss is granted as to the Servicer Defendants but denied as to the rest.

The Terms of the Loan Agreement Do Not Bar Plaintiff's Claims

Defendants argue that they were permitted to assess the Late Charge pursuant to Section 2.2(h) of the Loan Agreement, which states that when an amount due is not timely paid, “Borrower shall pay to Lender upon demand an amount equal to the **lesser** of (i) five percent (5.00%) of such unpaid sum **or** (ii) the maximum amount permitted by Legal Requirements in order to defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate Lender for the loss of the use of such delinquent payment” (emphasis added). Defendants’ position is that they were permitted by this section to assess a late fee of 5% of the unpaid principal. Plaintiff argues that Defendants were only permitted to assess the lesser of either 5% or the costs permitted by Legal Requirements in order to defray the handling and processing expenses incurred, and that this second amount is what the Extension Email referred to in stating that \$7,500 would be due.

A CPLR § 3211(a)(1) motion can only be granted when the documentary evidence “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mut. Life Ins. Co.*, 98 N.y.2d 314, 326 [2002]. When interpreting a contract, a court is to consider the “particular terms and expressions [...] in their context and in the light of the intention of the parties as manifested by the agreement as a whole.” *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 383 [1st Dept. 2002]. Defendants here argue that Section 2.2(h) simply means that they are permitted to charge “the lesser of 5% of the unpaid amount or the maximum amount permitted by law.” But that is contrary to the plain language of the contract. The term “Legal Requirements” is defined in the Loan Agreement as referring to “all governmental statutes, laws, rules, orders, regulations [...] and all permits, licenses, and authorizations relating thereto” and so on. The definition of Legal Requirements never refers to interest rates. If the parties wished the late fee to be either 5% or the maximum interest rate allowable by law, they could have easily drafted the agreement to reflect that choice. Indeed, many of the cases that Defendants cite to involve contracts that explicitly state that late fees may be either a specified number or the maximum interest rate allowed by law. The problem for Defendants here is that that is not how the Loan Agreement in question was drafted.

Defendants have not shown how the costs incurred in processing a delinquent payment as permitted by any relevant governmental statute would be more than 5% of the unpaid sum. Defendants’ interpretation of Section 2.2(h) would require the Court to read out subsection (ii) in its entirety, or at the least read out a substantial portion of that subsection. The clear drafting is that Defendants can charge the lesser of (i) or (ii), and therefore (ii) cannot be simply “explanatory” and unrelated to a calculation of late fees as Defendants urge. The lack of any semicolon or comma or separation between “maximum amount permitted by Legal

Requirements” and the phrase “in order to defray the expense incurred by Lender” clearly indicate that the sentence is a single concept and therefore the expenses incurred must be directly related to the maximum amount permitted by Legal Requirements. Such a reading as Defendants urge (in which the language referring to incurred expenses is not meant to refer to any expenses actually incurred) cannot be said to conclusively bar Plaintiff’s claims, and therefore the complaint cannot be dismissed on this ground. Any case law that Defendants cite to on this matter either interpret differently worded contracts or are not binding on this Court.

The Voluntary Payment Doctrine Does Not Bar Plaintiff’s Claims as They Repeatedly Protested

Prior to Payment

Defendants cite to the voluntary payment doctrine and argue that Plaintiff is barred from challenging the Late Charge because they paid it at the time of closing. This doctrine “bars recovery of payments voluntarily made with full knowledge of the facts, in the absence of fraud or mistake of material fact or law.” *DRMAK Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 403 [1st Dept. 2015]. The party receiving the demand for money must “take its position at the time of the demand, and litigate the issue before, rather than after, payment is made.” *Id.* The purpose of this common-law doctrine is to, in the interests of fairness, protect those who justifiably relied on “the opposing party’s words or conduct [and have] been misled into acting upon the belief” that the payment would not be opposed. *U.S. Bank, N.A. v. Cordero*, 191 A>D.3d 490, 491 – 92 [1st Dept. 2021]. Here, Plaintiff has provided evidence that they objected in writing to the Late Charge well in advance of the payment, that they were required to pay the Late Charge in order to close on the loan, and that they were consistent in their opposition to the charge. Defendants’ argument that Plaintiff was required to bring litigation prior to making the payment is unavailing in the face of the allegations that Plaintiff made it

clear to Defendants that they were opposed to the imposition of the Late Charge and were paying it under protest.

The Quasi-contractual Claims Are Permitted to Be Pled in the Alternative

Defendants argue that the quasi-contractual claims in the complaint are duplicative of the breach of contract claims. Generally, “the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Feigen v. Advance Capital Management Corp.*, 150 A.D.2d 281, 283 [1st Dept. 1989]. But while recovery under both would be barred, “a party is permitted to plead alternate theories.” *Jeremy’s Ale House Also, Inc. v. Joselyn Luchnick Irrevocable Trust*, 22 A.D.3d 6, 10 [1st Dept. 2005]; *see also Vays v. 139 Emerson Place*, 94 A.D.3d 480, 482 [1st Dept. 2012]. Especially where as here, there is question at this stage of whether the payments were made pursuant to the contract, dismissal of the quasi-contractual claims at this stage would be premature.

Dismissal of the Servicer Defendants Is Proper

Defendants have moved to dismiss the complaint in its entirety as to the Servicer Defendants on the grounds that they were not a party to the Loan Agreement. Although it was the Servicer Defendants who communicated with Plaintiff regarding the Late Charge and the Extension Email, Defendants readily state in their papers that any actions taken by the Servicer Defendants was done so on behalf of Lender and as their agent. Plaintiff has not opposed the motion to dismiss as to the Servicer Defendants but stated that at this early stage it is unclear which defendants would bear liability. Therefore, dismissal of the complaint as to the Servicer Defendants would be proper. Accordingly, it is hereby

ADJUDGED that the motion to dismiss the complaint is granted as to the defendants Midland Loan Services and PNC Bank, National Association; and it is further

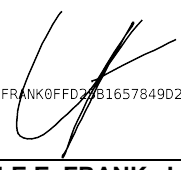
ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website); and it is further

ORDERED that the remaining defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

<u>9/26/2025</u> DATE			 20250926162732LFRANK0FFD27B1657849D2B498A0FD3527FDB2 LYLE E. FRANK, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE